6

No. 2427

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. M. COURTNAY and H. K. LOVE,

Plaintiffs in Error,

vs.

TOM P. KING and BAPTISTE SERAFINO,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

McGOWAN & CLARK,
Fairbanks, Alaska,
Attorneys for Plaintiffs in Error.

Filed this.....day of October, 1914.

Filed .....*Clerk.*

NOV 4 - 1914

By .....*Deputy Clerk.*

F. D. Monckton,
Clerk.

No. 2427

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. M. COURTNAY and H. K. LOVE,

Plaintiffs in Error,

vs.

TOM P. KING and BAPTISTE SERAFINO,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

The Case.

This is an action in replevin instituted on July 15, 1912, by Tom P. King and Baptiste Serafino, plaintiffs, as trustees for themselves and other unnamed, against H. K. Love, as United States Marshal for the Fourth Division, Territory of Alaska, and R. M. Courtnay, to recover the possession of certain personal property, described in plaintiffs' complaint, of the alleged value of $1,700.00, seized on attachment on June 11, 1912, together with damages in the sum of $300.00, and in the event the return of said property could not be had, for the value thereof (Tr. pp. 2-5). On April 18, 1913,

R. M. Courtnay filed a separate answer, denying in explicit terms, or on information and belief, all the allegations of plaintiffs' complaint, except that he admitted that plaintiffs had demanded of him that he return and redeliver possession of said property to them, and that he had refused so to do. As a separate affirmative defense, he alleges that on the day the property was alleged to have been seized, an action was instituted in the office of the Commissioner and ex-officio Justice of the Peace of Fairbanks Precinct, at Chatanika, entitled J. E. Barrack v. Russian Mining Company, wherein judgment was prayed for $570.20, together with costs of suit, and there being no Marshal or Deputy Marshal at the place where Court was held, that the Commissioner and ex-officio Justice of the Peace, in pursuance of the provisions of the laws of the Territory of Alaska, appointed him as a special officer for the purpose of serving a writ of attachment in said cause, and that he, on said 11th day of June, 1912, received writ of attachment from said Commissioner, and in pursuance of the provisions thereof, levied on all the Russian Mining Company's interests in a lot of wood, a boiler house, machinery contained therein, the machinery in the mine or on the surface of the mine being operated by it, and upon the messhouse, all provisions, ranges, cooking utensils, etc., situate on Discovery Claim, Chatanika River, Fairbanks Precinct, Territory of Alaska, and that the property so attached was embraced in the list claimed by the plaintiffs in this action; that he placed a keeper in charge of the property and sold, as perishable

property, 145 lbs. of beef, and afterwards paid in to the United States Marshal the money received therefor (Tr. pp. 6-8).

As a second affirmative defense, he alleges that on June 11, 1912, another action was instituted in the same Court by C. E. Danforth against Russian Mining Company, praying judgment for the sum of $437.50, and that in said cause he was appointed a special officer and levied a second attachment on the same property, placed a keeper in charge, and that thereafter his authority ceased by virtue of the terms of his appointment, and he had nothing further to do with said property (Tr. pp. 9-10).

On April 18, 1913, H. K. Love, as United States Marshal, filed a separate answer in said cause, denying expressly or upon information and belief all matters contained in said complaint, with the exception that he admitted that demand had been made upon him by the plaintiffs for the return of the property (Tr. pp 11-12). For a separate affirmative answer and defense, he alleged that he was the duly appointed, qualified and acting United States Marshal for the Fourth Judicial Division, Territory of Alaska, and that on June 11, 1912, J. E. Barrack instituted an action in the Commissioner's Court for Fairbanks Precinct, at Chatanika, against the Russian Mining Company, seeking to recover $570.22, with costs, alleging the issuance of a writ of attachment in said cause, directed to said United States Marshal, the appointment of R. M. Courtnay as a special officer to serve the writ, the service of the writ and attachment

of personal property alleged to belong to the Russian Mining Company, particularly describing the property attached, the list of which contains a portion of the property claimed by the plaintiffs, alleging the appointment of a keeper to take charge thereof, and that thereafter judgment was rendered in said cause in favor of Barrack and against the Russian Mining Company for $570.22, with interest, and $22.70 costs; that after the attachment was levied, the special officer had caused an inventory of the property attached to be made, and had sold a portion of the perishable property, to-wit: 145 lbs. of beef, for $40.00, and after deducting fees for services rendered, had delivered $34.34 to the defendant United States Marshal to hold, subject to the final determination of the cause; that on June 21, 1912, an execution was issued out of said Commissioner's Court in said cause, and on June 24, 1912, it was placed in the hands of the defendant United States Marshal for service, with instructions to levy upon and sell sufficient property of the Russian Mining Company to satisfy the judgment; and that under the terms thereof the defendant levied upon the property theretofore attached by special officer R. M. Courtnay, other than the property sold as perishable, and on July 23, 1912, sold said property to J. E. Barrack and Paul Ringseth for $667.00, which sum was applied toward the satisfaction of said judgment, after deducting his fees for services rendered, and that he had a balance of $90.60 then remainining in his possession; that at the time of the levy of the attach-

ment, the property, which was afterwards sold by him under the execution, was in the exclusive possession of the Russian Mining Company, and that they were the owners thereof at the time, and at the time of the levy of the execution it was in the possession of the United States Marshal (Tr. pp. 12-17).

For a second, further and affirmative answer and defense, he alleges the institution of an action in the Commissioner's Court for Fairbanks Precinct, at Chatanika, by C. E. Danforth, as plaintiff, to recover the sum of $437.50, alleges the attachment of the same property described in his first affirmative answer, alleges the rendition of judgment in said action by the Commissioner on June 21, 1912, the service of the writ of execution on June 26, upon the same property levied on in the case of Barrack v. Russian Mining Company, and the application of said sum of $90.60 which remained after satisfying the Barrack judgment, and alleges that at the time of the attachment, the property was in the possession of the Russian Mining Company, and at the time of the levy of the execution, it was in the possession of the defendant as United States Marshal (Tr. pp. 17; 22).

For a third affirmative answer and defense, the defendant Love alleged that the Russian Mining Company, on April 29, 1912, gave a bill of sale of certain property, being a portion of the property in dispute, to C. H. Ward, but retained possession thereof, and that the transfer was for the purpose of cheating and defrauding creditors of the Russian Mining Company; that on

June 11, 1912, the Russian Mining Company were indebted to J. E. Barrack and C. E. Danforth and others, and on said day, for the purpose of hindering, delaying and defrauding their creditors, said Ward executed a pretended assignment or release of the property formerly conveyed to him, to the plaintiffs in this action, and at the time said assignment was made the property had already been attached; that the Russian Mining Company were insolvent and that the bill of sale to Ward was fraudulent, in that no actual or continuous change of possession of the property pretended to have been transferred had ever taken place, and the Russian Mining Company continued to use a portion of the property alleged to have been conveyed to Ward, and that the provisions, etc., described in plaintiff's complaint were purchased subsequent to the transfer to Ward; that both transfers were void as respects J. E. Barrack and C. E. Danforth (Tr. pp. 22-26).

For a fourth separate and further affirmative answer and defense, said defendant pleaded that no trust was ever created in plaintiffs in the action, by an instrument in writing, as prescribed by law, and any claims made by the plaintiffs were without right and void (Tr. p. 26).

On April 24, 1913, the plaintiffs filed their reply to the separate answer of the defendant Courtnay, denying each and every matter set forth in the affirmative defenses (Tr. pp. 26-27).

On April 24, 1913, the plaintiffs filed their reply to the answer of H. K. Love, denying each and every matter contained in the first affirmative defense, with the

exception that the property described in the first affirmative defense is embraced in the list of personal property claimed by the plaintiffs; denying each and every matter in his second affirmative defense, except that they make the same admission in regard to the personal property as that in the answer to the first affirmative defense; denying each and every matter contained in the third affirmative defense and all matters and things contained in the fourth affirmative defense; and setting up a further reply to the first and second affirmative defenses, in which they allege that the Russian Mining Company had no interest in any of the property attached by the defendants, at the time said attachment was levied, that the commissioner had no authority to issue the writs of attachment or execution, and that the same were void and that the commissioner had no jurisdiction of the Russian Mining Company and no authority to appoint R. M. Courtnay a special officer.

The evidence developed the following facts:

That prior to April 30, and up until June 11, 1912, the Russian Mining Company were engaged in mining operations on No. 1 below Discovery on Chatanika, Fairbanks Recording District, and on April 30, 1912, executed and delivered to C. H. Ward a bill of sale of 200 cords of 16-foot and 4-foot wood, one 20-horsepower American hoist, pipes, hose, points, fittings, bucket and carrier and bucket block, all cables, flumes, sluice boxes, cooking range and dishes, situate on said mining claim (Tr. p. 33), as security for their indebtedness to him (Tr. p. 66) in the sum of $1,250.00 (Tr. p. 71); that Ward left

the property in the possession of the vendors and permitted them to use it as their own and asserted no claim of ownership thereover, and put up no notices claiming it as his property (Tr. pp. 66; 70; 73); that Ward asked for the bill of sale as he feared the Russian Mining Company would be attached and he desired to secure his own claim (Tr. p. 71); that part of his indebtedness was represented by option to sell certain machinery to the Russian Mining Company for $1,000.00 (Tr. p. 72); that on June 11, 1912, the Russian Mining Company was unable to pay its bills, attachments were threatened and Ward took back his machinery, upon which the Russian Mining Company had an option for $1,000.00 (Tr. p. 72), and which was included as a part of the indebtedness for which the property was transferred, and after taking back said machinery, the indebtedness of the Russian Mining Company to Ward, for which the bill of sale was security, was the sum of $250.00 (Tr. p. 72); that in the forenoon of the same day the plaintiffs desired to secure an attachment against the property of the Russian Mining Company for wages due them, but for some reason that does not appear were unable to secure such writ (Tr. pp. 67; 73); that Ward knew that Barrack and others were getting out an attachment against the property of the Russian Mining Company, so he proposed to the Russian Mining Company that he transfer his interests in the property covered by the bill of sale to the men (Tr. pp. 69; 73), and about 11 a. m. (Tr. p. 68) indorsed on his bill of sale the following:

"Chatanika, Alaska, June 11, 1912.. I the undersigned holding a bill of sale of mining property described in this bill of sale, do hereby release said property to the following laborers of the Russian Mining Company. They are to hold wood and machinery for wages due them. This release is given to Robert Serafino and Tom P. King who act as trustees for the others. (Signed) C. H. Ward. Witness: James M. White."

That Ward merely released to plaintiffs whatever interest he had in the property, which was security for but $250.00 (Tr. p. 72), as he had already taken his machinery back; that after the indorsement was made on the bill of sale, the men did nothing and made no effort to secure possession of the property (Tr. p. 68), and posted no notices claiming ownership (Tr. p. 51), and did nothing but "look around" (Tr. pp. 51-52); that about noon of the same day, approximately an hour or an hour and a half after said indorsement was made, the defendant Courtnay, acting as a special officer in the case of Barrack v. Russian Mining Company, then pending in the Commissioner's Court at Chatanika, came to the ground and attached all the property in dispute, as well as other property which was still in the possession of the Russian Mining Company (Tr. p. 68), put up notices of attachment (Tr. p. 47), nailed up the houses where machinery was located, and took the provisions away (Tr. pp. 38; 83); that the plaintiffs and the rest of the men then left and took no steps in regard to gaining possession of the property, and the

United States Marshal remained in possession thereof (Tr. p. 100); that at a later hour on the same day, the second attachment was levied on the property in dispute, in the case of Danforth v. Russian Mining Company (Tr. pp. 107-109);

That on June 18, 1912, judgment was rendered by default, in favor of the plaintiff, in each of the two actions in which writs had been issued (Tr. pp. 101; 116); that on June 21, 1912, execution was issued by the Commissioner at Chatanika, in the case of Barrack v. Russian Mining Company (Tr. p. 89), and on June 24, 1912, the execution was delivered to the defendant United States Marshal, and on June 26, 1912, he levied upon and offered for sale the property in controversy, together with other property of the Russian Mining Company, and after twice postponing the sale, on July 23, 1912, sold said property for $667.00 (Tr. pp. 87-89); that on June 26, 1912, execution was issued in the case of Danforth v. Russian Mining Company, placed in the hands of the defendant United States Marshal, and by him executed by levying on the property of the Russian Mining Company, theretofore levied on in the case of Barrack v. Russian Mining Company, and the sale of said property was postponed upon the same dates and for the same periods as the sale in Barrack v. Russian Mining Company, at the request of J. E. Barrack, assignee of Danforth, until July 23, 1912; that it was found that after paying the Marshal's expenses and paying the prior judgment in the case of Barrack v. Russian Mining Company, there remained $90.60 to apply on the

junior execution in the Danforth case (Tr. pp. 103-105);

That on June 29, 1912, after the property in controversy, with other property, had been seized under said executions by the defendant United States Marshal and offered for sale, the plaintiffs served on defendants a notice claiming title to the said property, by virtue of the bill of sale to Ward and the transfer of his rights thereunder to plaintiffs (Tr. pp. 62-64); and during the trial of the action plaintiffs' counsel admitted that the only claim the plaintiffs had to any of said property was under the bill of sale from Ward and the alleged taking possession of the property by plaintiffs (Tr. p. 38).

That on June 11, 1912, the Commissioner at Chatanika regularly appointed R. M. Courtnay a special officer to serve the attachments in the cases of Barrack v. Russian Mining Company and Danforth v. Russian Mining Company (Tr. pp. 99; 115), but the executions in both cases were levied by a deputy of the defendant H. K. Love (Tr. pp. 89; 104); that after the attachment was levied by R. M. Courtnay, he made an inventory of the property attached by him (Tr. pp. 91; 106); that on June 11, 1912, special officer Courtnay also served the summons on the Russian Mining Company (Tr. pp. 100; 115).

No evidence was introduced at the trial showing that an express trust was created in writing, signed by the Russian Mining Company, and assented to by the beneficiaries or the trustees. The plaintiffs introduced an instrument written in Russian, being a list of names, claiming same to be a list of the beneficiaries under the

trust (Tr. p. 60), and also attempted to introduce, for the purpose of proving the amounts due to various laborers, a list of names with the amounts set after them, but the evidence was excluded as incompetent (Tr. p. 59). The only evidence given at the trial as to the amounts due to any laborers working on the ground on June 11, 1912, for which the plaintiffs claim to be trustees, was the evidence of Carl Post that the Russian Mining Company owed him $257.50 (Tr. p. 58), but no evidence was introduced to show a trust created for the payment of his claim; and plaintiff Serafino testified that there was $200.00 due to him (Tr. p. 45). Plaintiffs also attempted to prove that the Russian Mining Company gave them a bill of sale of the cookhouse, groceries, etc., before the attachment was levied by special officer Courtnay (Plaintiffs' Exhibit 2, Tr. p. 36), but upon cross-examination the witness admitted that it was executed after the attachments were levied and the property was in the possession of the United States Marshal (Tr. pp. 48; 49; 50).

At the close of plaintiffs' case the defendants moved for a non-suit or directed verdict (Tr. pp. 83; 86), which was denied by the Court. The defendants then put in their case, the Court instructed the jury (Tr. pp. 128-137) and they retired, and on November 14, 1913, brought in a verdict against the defendants, in favor of plaintiffs, in the sum of $575.00 (Tr. pp. 137-138).

On November 17, the defendants moved for a new trial (Tr. pp. 138-140), which motion was denied (Tr. p. 140). Judgment was entered on December 9, 1913

(Tr. pp. 142-144); bill of exceptions was presented within the time prescribed by law and the rules of Court and settled on March 11, 1914 (Tr. pp. 141-142). Petition for writ of error was filed and allowed on January 26, 1914.

The defendants contend (1) that there was no authority or evidence to justify the entry of any judgment against R. M. Courtnay under any conditions; (2) that the alleged bill of sale to Ward was intended as a chattel mortgage and, as such, was, as against the creditors of the Russian Mining Company, void (a) because the possession was retained by mortgagor, and (b) because possession being retained by mortgagor, no affidavit of merits was attached to the mortgage and none of the provisions of the Alaska Code relative to its execution complied with; (3) that Ward, on June 11, 1912, only transferred to plaintiffs what interest he held in a void chattel mortgage, and that there was due from the Russian Mining Company to Ward at that time the sum of but $250.00, and the plaintiffs received no other title; (4) that plaintiffs never went into possession of the property and that the Russian Mining Company were in possession at the time the attachment was levied; (5) that the defendants' possession under the writs of attachment was superior to any right of possession that had been obtained by the plaintiffs; (6) that plaintiffs failed to establish an express trust and the alleged trust under which they claim is void; (7) that plaintiffs failed to prove the amounts due to any persons for whom they allege they are trustees, and plaintiff Serafino only

proved that there was $200.00 due him individually and $257.50 due one Carl Post, who was not connected with said alleged trust by any competent testimony; (8) that from any theory or view of the case, the verdict of the jury was excessive; (9) that the Court should have granted a new trial, or required plaintiffs to remit all sums over and above the amount of the plaintiff Serafino's claim, if the Court was convinced that plaintiffs received any title until the transfer from Ward on June 11, 1912; (10) that plaintiffs' complaint fails to state a cause of action against defendants.

The plaintiff in error relies upon the following

Assignment of Error.

1. The Court erred in entering the judgment of date December 9, 1913, in the above entitled action;

2. The Court erred in overruling defendants' motion for new trial;

3. The Court erred in receiving and accepting the verdict of the jury, given, made and entered in the above entitled cause on November 14, 1913;

4. The Court erred in overruling defendants' request, at the conclusion of the plaintiffs' case, for non-suit and to dismiss said action;

5. The Court erred in refusing, at the conclusion of plaintiffs' case, upon the motion of the defendants, to direct the jury to bring in a verdict in favor of defendants;

6. The Court erred in entering any judgment against

the defendant, R. M. Courtnay;

7. The Court erred in refusing defendants' motion to strike out certain evidence given by Baptiste Serafino, one of the plaintiffs, said testimony being as follows:

."Q. Now state what you did under those instructions as trustees that same day.

"A. Well, we went down on the claim and took possession of it.

"MR. CLARK: We object to that as calling for a conclusion and ask that it be stricken.

"THE COURT: The answer may stand.

"MR. CLARK: We save an objection."

8. The Court erred in permitting the introduction of plaintiffs' Exhibit No. 3, over defendants' objection and exception, said exception and exhibit being as follows:

"MR. CLARK: We object, as we contend that there are names on there that do not belong there.

"THE COURT: The paper may be admitted for the purpose stated.

"(Marked Plaintiffs' Exhibit 3.)

"(Plaintiffs' Exhibit 3 is a list of names as follows:)

"Bozs Wucettih,

"Nick Cvietovich,

"Mike Zizich.

"Enan Honlob,

"Alexander Honob,

"Gob Ston,

"Alick —'—,

"Tom King,

"Sam Falar,

"Nick Aldatoff,

"Shorn,

"Job Jankuwzki,
"Call Post,
"Baptist Serafino,
"Juan Mien Seki.

"MR. CLARK: We note an exception. (Exception allowed)."

Argument.

Section 551 of the Compiled Laws of Alaska provides as follows:

> "Sec. 551. It shall be the duty of the Commissioner, upon the presentation for that purpose of any mortgage or conveyance intended to operate as a mortgage of goods and chattels, or a copy of any such instrument, and the payment of his fees, to indorse thereon the time of receiving the same, and to deposit such instrument or copy in his office, to be kept for the inspection of all persons interested."

Section 556, Compiled Laws of Alaska, provides as follows:

> "Sec. 556. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods, or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, action commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed, or defrauded, shall be void."

Section 557, Compiled Laws of Alaska, provides as follows:

"Sec. 557. Every grant or assignment of any existing trust in lands, goods, or things in action, unless the same be in writing, subscribed by the party making the same, or by his agent lawfully authorized, shall be void."

Section 740, Compiled Laws of Alaska, provides as follows:

"Sec. 740. A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith for value, unless—

"(1) The possession of such property be delivered to and retained by the mortgagee; or

"(2) The mortgage provide that the property may remain in the possession of the mortgagor and be accompanied by an affidavit of all the parties thereto, or, in case any party is absent from the precinct where such mortgage is executed, at the time of the execution thereof, an affidavit of those present and of the agent or attorney in fact of such absent party that the same is made in good faith to secure the amount named therein, and without any design to hinder, delay, or defraud creditors, and be acknowledged and filed as hereinafter provided."

Section 743, Compiled Laws of Alaska, provides as follows:

"Sec. 743. Every mortgage of personal property, together with the affidavits of the parties thereto or a copy thereof, certified to be correct by the person before whom the acknowledgment has been made, must be filed in the office of the Recorder of the

precinct where the mortgagor resides, and of the precinct where the property is at the time of the execution of the mortgage, or, in case he is not a resident of the district, then in the office of the Recorder of the precinct where the property is at the time of the execution of the mortgage; and the Recorder must, on receipt of such mortgage or copy, indorse thereon the time of receiving the same, and file and keep the same in his office for the inspection of all persons, and shall enter in a book, properly ruled and kept for that purpose, the names of all the parties—the names of the mortgagors to be alphabetically arranged,—the consideration thereof, the date of its maturity, and the time of filing the same."

Section 972, Compiled Laws of Alaska, provides as follows:

"Sec. 972. The marshal or deputy marshal to whom the writ is delivered shall execute the same without delay, as follows:

"First. Real property shall be attached by leaving with the occupant thereof, or if there be no occupant, in a conspicuous place thereon, a copy of the writ certified by the marshal.

"Second. Personal property capable of manual delivery to the marshal, and not in the possession of a third person, shall be attached by taking it into his custody.

"Third. Other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having possession of the same, or if it be a debt, then with the debtor, or if it be rights or shares in the stock of an association or corporation, or interest or profits thereof, then with such person or officer of

such association or corporation as this Code authorizes a summons to be served upon."

Section 1843, Compiled Laws of Alaska, provides as follows:

"Sec. 1843. Whenever it appears to the Justice that any process or order authorized to be issued or made by this Code will not be served for want of an officer, such Justice may appoint any suitable person not being a party to the action to serve the same; such an appointment may be made by an indorsement on the process or order in substantially the following form, and signed by the Justice with his name of office: 'I hereby appoint A. B. to serve the within process, or order,' as the case may be."

Section 1875, Compiled Laws of Alaska, provides as follows:

"Sec. 1875. Every sale or assignment of personal property, unless accompanied by the immediate delivery and the actual and continued change of possession of the thing sold or assigned, shall be presumed prima facie to be a fraud against the creditors of the vendor or assignor, and subsequent purchasers in good faith and for a valuable consideration, during the time such property remains in the possession of said vendor or assignor."

I.

THE ORIGINAL BILL OF SALE FROM THE RUSSIAN MINING COMPANY TO WARD WAS INTENDED AS A MORTGAGE, AND, AS SUCH, WAS VOID AS TO ATTACHING CREDITORS OF THE RUSSIAN MINING COMPANY.

The bill of sale was intended to secure the payment

by the Russian Mining Company to Ward of $1,250.00 (Tr. pp. 66; 72), and on June 11, 1912, the indebtedness was reduced to $250.00 (Tr. pp. 72; 75; 81). The property remained in the possession of the Russian Mining Company at all times (Tr. pp. 66; 68).

Ward, a witness for the plaintiffs, testified as follows:

> "Q. Where was the machinery and wood at the time you say you gave it to them?
>
> "A. On One Below, Chatanika Flats.
>
> "Q. In whose possession was it?
>
> "A. It was in the Russian Mining Company's possession yet." (Tr. p. 68.)

As a transfer of the title, the alleged bill of sale was void as against creditors of the Russian Mining Company.

Sec. 1875 Comp. Laws of Alaska, supra.

It was void as a chattel mortgage, as far as claims of creditors of the Russian Mining Company were concerned, because not executed with the formalities required by law, where the possession was retained by the mortgagor. (See Plaintiffs' Exhibit 1, Tr. pp. 33-34.)

Sec. 740 Comp. Laws of Alaska, supra.

Ward only transferred the interest he held in the personal property. He testified as follows:

> "Q. So you considered that Serafino and King, when you turned it over to them as trustees—you considered you were simply releasing the claim you had on it as security for your claim; you were releasing that to them. A. I was.
>
> "Q. So as to protect them on their wages. A. Yes.

"Q. And the only instrument that was executed by the Russian Mining Company to you was the bill of sale on the 29th of April, 1912? A. That was all.

"Q. And they continued to use the machinery just as they had before. A. They did.

"Q. They continued to burn up the wood that was on the ground. A. Yes." (Tr. pp. 72-73.)

Ward knew the men were going to attach the identical property covered by his bill of sale and recognized their right so to do. He testified as follows:

"Q. And this bill of sale was executed by you and this property turned over to these trustees for the reason that they went to Commissioner Weiss out there for the purpose of getting an attachment and he refused to issue one. A. Yes sir.

"Q.. They intended to attach this identical property.

"A. They did. Yes.

"Q. And it was to prevent any costs accruing to the laborers or any expense to them, that you voluntarily turned it over to them and put them in your shoes.

"A. It was. (Tr. pp. 77.78.)

If Ward had no valid claim he could assert as against bona fide *existing or attaching creditors of the Russian Mining Company, he transferred no greater interest to plaintiffs.*

II.

THE ONLY WAY PLAINTIFFS COULD HAVE SECURED A TITLE OF ANY GREATER DIGNITY THAN THE TITLE TRANSFERRED BY WARD WOULD HAVE BEEN BY TAKING THE ACTUAL PHYSICAL POSSESSION OF THE PROPERTY, BETWEEN THE TIME WARD RELEASED ANY CLAIM HE HAD THEREON AND THE TIME THE ATTACHMENT WAS LEVIED.

No possession was taken by plaintiffs and the evidence on that point is not conflicting.

The plaintiff Serafino, on direct examination, testified as follows:

"Q. Did they attempt to do anything with this property after they turned it over to you?

"A. Who, the Russian Mining Company?

"Q. Yes sir. A. No sir.

"Q. What did you do when you got down there, you and the rest of the men.

"A. We started to gather up everything.

"Q. Did you commence to make a list of it?

"MR. CLARK: We object to the leading questions.

"MR. CLEGG: Q. What did you commence to do?

"A. Well, we tried to take a list of that stuff that was left there. Well, take—estimate things.

"Q. Took a rough estimate? A. Yes sir.

"Q. Of the list of stuff that was there. A. Yes sir." (Tr. p. 37.)

But on cross-examination, he says:

"Q. You didn't measure the wood in June after they shut down mining, did you? A. No.

"Q. After Courtnay told you to get out of the

bunkhouse, or out of the messhouse, you boys left the claim, didn't you? A. Yes sir.

"Q. You hadn't put up any notices before that, had you? A. No sir.

"Q. And you didn't put up any after that?

"A. No sir.

"Q. So after Courtnay told you you couldn't eat up the grub you boys went away and you got work elsewhere? A. Yes sir.

"Q. And none of you went back again, did you, until after the marshal sold the property? A. No sir. * * * *

"Q. After Mr. Ward gave you this paper in the cabin, what did you boys do just after that?

"A. We just went down on the claim.

"Q. You just went down and commenced to look around a little bit. A. Yes sir.

"Q. And you went up town, didn't you?

"A. I went up town afterwards, in the afternoon sometime.

"Q. And you saw Courtnay up town about 12 o'clock, didn't you?

"A. I couldn't say exactly, but I think it was about that time.

"Q. Right after Ward had signed this paper, you went over onto the claim. A. Yes sir.

"Q. And a little bit after that Mr. Courtnay came down and put up some notices. A. Yes sir." (Tr. pp. 51-52.)

Serafino, on direct examination, testified, over defendants' objection, that the men took possession of the claim (Tr. p. 36).

On this subject, Ward testified:

"Q. What did the men do between the time you say you turned it over to them and the time the attachment was levied. A. They did nothing.

"Q. *They just stood around there and did nothing.*

"A. *They were around there and did nothing.*

"Q. They didn't stick up any notices of any kind on the wood or on the machinery, or anything of that kind?

"A. I believe they put up notices on the wood.

"Q. Do you know when those notices were put up?

"A. Directly afterward. I wouldn't be certain of it because I was working at the time, but I think they did.

"Q. *Did you see them put them up?*

"A. *No sir.* But they told me they were going to put them up.

"Q. *You don't know of your own knowledge whether they did or not?*

"A. *No. I don't know whether they did or not.*" (Tr. pp. 68-69.)

John Barrack, as a witness for the defendants, testified that he was on the ground immediately after the attachment was levied by Courtnay and saw no notices put up by the men, and was on the ground for eight or ten days thereafter, saw some of them there for a couple of days, but that they were doing nothing (Tr. p. 119).

Carl Post, another witness, present when Ward made the assignment of his interests in the property covered by the bill of sale, was sworn as a witness for plaintiffs, but was not asked anything about what kind of possession was taken by the men (Tr. p. 56-58).

The foregoing is a summary of *all* the testimony concerning any change of possession of the property in controversy prior to the levy of the writ of attachment *and is not conflicting* and *conclusively* shows that the property in question was in the *possession of the Russian Mining Company* at the time the attachment was levied. We respectfully submit that it was an abuse of discretion on the part of the Court in refusing to grant a new trial and in refusing to grant a non-suit at the close of the plaintiffs' case.

For authorities as to what acts are necessary to constitute change of possession, see:

Allen v. Steiger, 31 Pac., 226-227;

Guthrie v. Carney (Cal.), 124 Pac., 1045;

Howe v. Johnson (Cal.), 40 Pac., 42;

Ruggles v. Cannedy (Cal.), 53 Pac., 911;

Taylor v. Malta Mercantile Co. (Mont.), 132 Pac., 550;

Dodge v. Jones (Mont.), 14 Pac., 707;

Stevens v. Erwin, 15 Cal., 503;

Ray v. Raynolds (Cal.), 9 Pac. 15;

Sweeney v. Coe et al. (Colo.), 21 Pac., 705;

Austin et al. v. Terry (Colo.), 88 Pac., 189-190;

Springer v. Kreuger (Colo.), 34 Pac., 269-271.

III.

THE LEVY OF THE WRIT OF ATTACHMENT BY SPECIAL OFFICER COURTNAY WAS VALID AND THE POSSESSION SO GAINED BY THE UNITED STATES MARSHAL WAS GOOD AS AGAINST THE CLAIMS OF THE PLAINTIFFS.

For authority of a Commissioner to appoint a special officer, see

Sec. 1843 Comp. Laws of Alaska, supra.

Courtnay in levying the attachment nailed up the buildings (Tr. p. 83) where the property was stored, posted notices of attachment (Tr. p. 47) on the bulky property, and took away the provisions (Tr. pp. 37-38) and other property capable of being moved. The attachment was in accordance with the provisions of the laws of Alaska. See

Sec. 972 Comp. Laws of Alaska, supra.

The wrongful taking of the property is alleged to have been on June 11, 1912, when the attachments were levied, and all proof was directed to that date, and plaintiffs have elected to stand upon such taking as being wrongful. No claim is made by them that they were in possession when the property was seized on execution, and no question arises in the case at bar as to the validity of the executions or seizures thereunder.

IV.

THE ALLEGED ASSIGNMENT BY WARD TO THE PLAINTIFFS OF HIS ALLEGED INTEREST IN THE PROPERTY IN DISPUTE WAS IN EFFECT A RELEASE OF HIS CLAIM UNDER A VOID CHATTEL MORTGAGE ON THE PROPERTY.

Section 748, Compiled Laws of Alaska, provides as follows:

> "The provisions of the foregoing sections of this chapter (Sections 740-743 supra) shall extend to all such bills of sale, deeds of trust and other conveyances of goods, chattels, or personal property as shall have the effect of a mortgage or a lien upon such property."

On June 11, 1912, when Ward made the indorsements on the bill of sale (see page 9 of this brief), he recited:

> "I, the undersigned, holding a bill of sale of mining property described in this bill of sale, do hereby release said property to the following laborers of the Russian Mining Company," etc.

As he has already admitted that the bill of sale was merely held as security for an indebtedness, and as it was executed without the formality required by law as a protection against creditors, the effect of his indorsement was merely to release his mortgage on the property. It could not be construed as a creation of a trust on his part, and there was no consideration for his making the transfer to any person whomsoever, as he merely waived his unpaid claim of $250 when he found that the laborers intended to attach the identical property covered by his alleged bill of sale.

A trust in personal property cannot be created orally.

Sec. 557, Compiled Laws of Alaska, supra.

There is no pretense of claim on the part of plaintiffs that a trust was created in any other manner than by the indorsement made by Ward on the bill of sale. Consequently, the moment Ward released his alleged lien on the property, it became subject to the claims of attaching creditors and was subject to be taken on attachment at the time the defendant Courtnay levied the writ of attachment on the property in dispute, unless the Russian Mining Company had transferred title thereto between the time Ward released his void claim on the property and the time the attachment was levied, and this is neither alleged nor proven. Even should the indorsement by Ward on the bill of sale be treated as an attempt to create a trust, the trust is void for uncertainty.

> "The 'certainty' in a declaration of trust, which is necessary and sufficient to create a trust, has been construed to mean clear, explicit, definite and unequivocal expressions setting out the trust with such certainty that a court of equity may enforce its execution; and the element of certainty is especially necessary when the declaration of trust rests in parol. The rule requiring certainty is most frequently applied to the naming and defining of a beneficiary and the interest which he is to take, or the proportion in case there are several; but it is also applied to the designation of the property or subject matter of the trust, and the manner in which the trust is to be performed."
>
> 39 Cyc., pp. 58-61.
>
> Galligos Ex'rs v. Attorney General, 24 Am. Dec., 650.

From the endorsement made by Ward on said bill of sale, it is impossible to determine the beneficiaries under the alleged trust, or the proportionate share of each, if it were possible to identify them, as the assignment reads (referring to the assignment as set forth on page 9 of this brief), after reciting that he does release said property to the "following" members of the Russian Mining Company, "They are to hold wood and machinery for wages due them. This release is given to Robert Serafino and Tom P. King to act as trustees for the others." It is impossible to determine, without parol evidence, who the beneficiaries would be, the proportion that each would have in said alleged trust, or how the trust was to be executed, and in the trial of the action it was clearly demonstrated that the alleged trustee could not identify the beneficiaries.

In the case at bar, the trust could only have been created by the Russian Mining Company, and if created by them, was created by parol and was void.

Sec. 557, Compiled Laws of Alaska, supra.

Again, conceding, for the sake of argument, that the indorsement by Ward was a valid creation of a trust, if properly executed, it was void by reason of the failure to transfer possession of said property to the trustees.

> "Except where the creator of a trust constitutes himself trustee, it is indispensably necessary to the creation of an express trust that the creator do everything which can be done, considering the character of the property comprising the trust, to transfer the property to the trustee in such mode as will be

effectual to pass the legal title."

39 Cyc., p. 76.

Bannock v. Magoon et al., 125 S. W., 535.

Title to personalty cannot, under the laws of Alaska, be transferred by bill of sale without the actual change of possession of the property. Ward was not the owner of the property and could not transfer the same. The Russian Mining Company did not attempt to sell the property or transfer same or give the alleged trustees possession of the property in such manner as would pass the title to said trustees, as against the claims of attaching creditors.

See authorities cited under subdivision 2 of this brief, page 25, supra.

There is no claim made by the plaintiffs that the Russian Mining Company did or performed any act or thing on the 11th day of June, 1912, to pass title to the alleged trustees, other than acquiescing in the indorsement made by Ward on the bill of sale.

If the endorsement made by Ward was effectual for any purpose (if it is not treated as a release of a mortgage void as to creditors), then it would merely be an assignment of a void chattel mortgage upon which there was due but two hundred fifty dollars, and that was all the interest the alleged trustees could receive therein.

If a transaction of this character were permitted to stand as the creation of a trust, there would be nothing to prevent dishonest mining operators from executing fraudulent chattel mortgages, bills of sale, or other alleged conveyances, and then have the holders transfer

same to irresponsible persons, who could thereupon dispose of said property for such sums as they saw fit and convert the proceeds thereof to any purpose except the settlement of the debts of the debtor, and the creditors would have no method whatsoever of ascertaining whether or not the funds realized from the sale of said property were legitimately disposed of. An alleged trustee could, under those circumstances, sequestrate all the available assets of a failing operator, convert them into cash, and pay the cash over to the fraudulent grantor.

We respectfully submit that the law never intended that a trust should be created in personalty, unless all the formalities ordinarily incident to trusts are strictly complied with, as they are usually intended to favor some particular classes or groups of creditors over others and should be hedged about by all necessary safeguards to protect the creditors of the debtor, who are not beneficiaries under the trust. We submit that the complaint in this action does not set forth a cause of action against the defendants, as it does not allege the creation of a valid trust under the laws of Alaska, for the reasons hereinbefore set forth, and that there was *no evidence* to sustain the verdict of the jury, and the Court should have granted a new trial to the appellants herein.

V.

THE ENTRY OF ANY JUDGMENT AGAINST THE DEFENDANT COURTNAY WAS ERRONEOUS.

Courtnay was appointed a special officer by the Commissioner and ex-officio Justice of the Peace, under the authority of Sec. 1843, Compiled Laws of Alaska, supra, for the purpose of levying attachments in two cases, and when the levies were completed his duties ended and his authority and control over the property terminated. He was not in possession of the property in dispute, nor was the same under his control when demand was made by the plaintiffs for the return thereof, as his limited control over the property was taken away prior to said time. by the law under which he was appointed.

VI.

THE COURT SHOULD HAVE GRANTED DEFENDANTS' MOTION TO STRIKE OUT THE TESTIMONY OF THE PLAINTIFF SERAFINO, WHEN HE TESTIFIED TO A LEGAL CONCLUSION, AS SHOWN IN THE SEVENTH ASSIGNMENT OF ERROR, PAGE 15 OF THIS BRIEF.

One of the principal, if not the most important, question involved in the trial of the case at bar was as to the possession of the personal property in dispute, on the 11th day of June, 1912, and that question was primarily a question of fact to be determined by the jury upon the evidence and proper instructions of the Court. What might constitute taking of possession to support one form of action would be vastly different from the acts neces-

sary to constitute such an actual, physical change of possession necessary to effectually carry title to personal property as against the claims of *bona fide* attaching creditors. The evidence adduced clearly shows that no possession was taken by the plaintiffs at the time in question, and the statement was purely a legal conclusion not justified by the facts in the case and fatally prejudicial to defendants under the instructions given by the Court.

The admission of Plaintiffs' Exhibit 3 (page 15 of this brief) was likewise erroneous and prejudicial to the defendants, as it was obviously introduced for the purpose of misleading the jury into believing that the beneficiaries under the alleged trust were known to the trustee and that all acts had been completed at the time the alleged trust was created, necessary to constitute a valid trust in personal property. The evidence respecting the list of names described in said exhibit was that it was a "list of names" and nothing more, and the list itself was in the Russian language.

The plaintiffs in error respectfully submit that if a transaction such as the one involved in this action, which was obviously intended to defeat *bona fide* creditors of the Russian Mining Company, is declared to be valid, the duties of a United States Marshal in levying attachments will be extremely hazardous, and the protection that is afforded to creditors by the laws relative to chattel mortgages, trusts, etc., as provided by Congress for the government of Alaska, will be practically nullified.

WHEREFORE, Plaintiffs in Error pray that the case at bar be reversed and the judgment heretofore rendered by the Court be set aside.

Respectfully submitted,

McGOWAN & CLARK,

Attorneys for Plaintiffs in Error.

Dated Fairbanks, Alaska,

October 8th, 1914.